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SSN MEDICAL PRODUCTS SDN BHD v. CREDIT GUARANTEE CORPORATION MALAYSIA BHD

HIGH COURT MALAYA, SHAH ALAM
GUNALAN MUNIANDY JC
[SUIT NO: 22ANCVC-89-08-2012]
B 26 FEBRUARY 2016

TORT: *Negligence – Duty of care – Breach – Allegation of – Whether defendant's role to provide necessary guarantee coverage to banks and act as guarantor for small medium enterprise ('SME') – Whether defendant had duty of care to manage loan* C *with reasonable care – Whether defendant had sole obligation to ensure credit information entered into Central Credit Reference Information System ('CCRIS') accurate and correct – Defendant provided false information regarding plaintiff's credit information to CCRIS – Whether caused serious prejudice and harm to plaintiff – Whether plaintiff's loan applications to other financial institutions* D *rejected due to defendant's misreporting – Whether damages suffered by plaintiff foreseeable*

TORT: *Defamation – Libel – Provision of wrongful credit information to Central Credit Reference Information System ('CCRIS') – Whether there were defamatory imputations against plaintiff – Whether there was publication to third party –* E *Whether obviously referred to plaintiff and no other entity or person – Whether continuous publication of false information malicious – Elements of libel – Whether satisfied*

The plaintiff, a Small Medium Enterprise ('SME') obtained a loan facility from Maybank in 2004 under a Corporate Guarantee Corporation Direct F Access Guarantee Scheme ('DAGS'). Under this scheme, Credit Guarantee Corporation (M) Bhd ('the defendant'), who was established expressly for the purpose of SMEs to obtain loan from banks, provided the guarantee cover needed to enable plaintiff to obtain loan from Maybank. In 2008, the plaintiff requested Maybank for the upliftment of its fixed deposit ('FD') with G Maybank to be used as a working capital for the plaintiff to buy low priced rubber which was the major primary product used by the plaintiff in its production. Maybank referred the matter to the defendant and thus began a series of negotiations between the plaintiff and the defendant. The request for the upliftment of the plaintiff's FD was rejected by the defendant and instead, the defendant liquidated the FD which was a collateral to the loan, to reduce H the loan amount to RM1,436,481.31. The said loan amount was restructured and a scheme of payment was agreed upon between the plaintiff and the defendant. The plaintiff then proceeded to make payment without any default. Subsequently, upon a search made by the plaintiff at the Bank Negara Malaysia Central Credit Reference Information System ('BNM CCRIS'), it I was discovered that the plaintiff had been wrongly reported as owing RM11,162,013 to the defendant. The defendant was promptly informed of the misreporting and admitted to the mistake but did not rectify the erroneous act. Meanwhile, the plaintiff's attempts to get loans from other

financial institutions were rejected due to the adverse BNM CCRIS report. As a result of this, the plaintiff suffered loss/damages in the form of profits, lost business opportunity and its good will amongst its suppliers and business parties. Hence, the plaintiff filed a suit against the defendant for (i) negligence in the conduct of the plaintiff's loan facility; (ii) for misrepresentation as to the credit status of the plaintiff to the BNM CCRIS; and (iii) for defamation for misrepresenting the status of the plaintiff's loan facility to CCRIS which the defendant allegedly continued to do even after commencement of this suit.

Held (entering judgment for the plaintiff):

(1) The defendant's role was to provide the necessary guarantee coverage to the banks and act as a guarantor for the SMEs in order to enable them to obtain loans from the banks. The plaintiff was an SME and the guarantee provided by the defendant to the plaintiff was under the DAGS which was a 100% guarantee by the defendant. From the evidence as to the relationship between the plaintiff and the defendant, particularly the purpose for which the defendant was established and the status of the plaintiff as an SME requiring loans from banks, it was plain and obvious that the defendant owed a duty of care to the plaintiff as it was clearly foreseeable that any erroneous reporting of the plaintiff's credit status to a credit rating agency would result in injury or harm to the plaintiff. It was fair and reasonable to impose on the defendant a duty of care to manage the plaintiff's loan with reasonable care and fulfil its obligation as a guarantor of the loan under the guarantee given to Maybank. (paras 10-13)

(2) The defendant had by its acts and omissions manifestly breached its duty of care to the plaintiff by allowing the plaintiff's loan to become a non-performing loan despite having been approached by the plaintiff to save the status of the loan. The defendant had also failed to monitor the plaintiff's DAGS loan with reasonable care and failed to fulfil its obligation as the guarantor under the letters of guarantee given to Maybank pursuant to the plaintiff's DAGS loan by allowing the plaintiff's loan to remain a non-performing loan ('NPL') for 19 months in arrears. Had the defendant honoured the terms of the letter of guarantee and discharged its obligations thereunder within three months of the plaintiff's default of the loan with Maybank or restructured the loan, the plaintiff's loan account would not have been rendered a NPL. (para 25)

(3) The defendant was further negligent when it breached its duty of care by misreporting to CCRIS that the plaintiff's loan with MB was in arrears of RM11 million. CCRIS was a centralised system that collects information on loans from banks and distributes back the report to the

banks in a form of credit report. The defendant had the sole obligation to ensure that all the credit information entered into the CCRIS was accurate and correct. This obligation had to be strictly discharged as the information was accessible to participating financial institutions. Hence, any false information or misreporting could cause serious prejudice and harm to the borrower in respect of its credit status. It was undeniable and uncontroverted that the defendant had continually been negligent in various respects in misreporting the plaintiff's loan to the CCRIS even after finalisation on the restructuring of the plaintiff's loan and also after the filing of this suit. There was evidence from SP1 to the effect that because of the negligence on the part of the defendant in the conduct of the plaintiff's loan, the plaintiff's various loan applications had been rejected by the financial institutions concerned. The breach of duty of care by defendant had, at least, materially contributed to the losses and hardship suffered by the plaintiff in regard to its credit standing and inability to obtain loans as a consequence of the misreporting to CCRIS. The element of causation had therefore been satisfied. (paras 26-32)

(4) The damages suffered by the plaintiff was definitely foreseeable by the defendant as there was an admission by the defendant themselves in their own letter which was issued to the plaintiff informing the plaintiff that its loan had been classified as NPL. Therefore, there was no doubt or dispute from the uncontroverted facts and circumstances adverted to that the loss and damage suffered by the plaintiff was reasonably foreseeable by the defendant in carrying out its role and function as a credit guarantor. This fact was beyond dispute as the defendant themselves admitted in their letter that the effect of the plaintiff's loan being wrongly classified as NPL would jeopardise the plaintiff's future loan applications. This erroneous classification was the direct result of the defendant's negligent reporting or submitting wrong information to CCRIS regarding the plaintiff's credit status. (paras 34 & 35)

(5) The defendant's negligent acts or omissions, basically form the provision of wrongful credit information to CCRIS, had satisfied the elements of libel. The words complained of in the form of the aforesaid wrongful credit information on this standing of the plaintiff were capable of bearing a defamatory meaning against the plaintiff. The false and untrue information reported by the defendant to CCRIS could be regarded as having defamatory imputations against the plaintiff. Further, the reporting of the false information by the defendant to CCRIS constituted publication to a third party and therefore, satisfied the element of publication as the information was accessible to participating banks and institutions. The defamatory information published obviously referred to the plaintiff and no other entity or person. That was a fact beyond any dispute. The defendant had failed to discharge the onus of

showing that the publication was fairly made by a person in the discharge of some public or private duty. Hence, the continuous publication of the said false and untrue information would in law be regarded as malicious as no attempt was made to rectify the record despite being made aware of the grave error. Thus, the plaintiff had, on a balance of probabilities, established its pleaded claim for the torts of negligence and defamation by libel against the defendant. (paras 39-43 & 45)

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & 2 Other Appeals [1995] 2 CLJ 912 CA ***(refd)***

Ng Hong Chai & Anor v. Public Bank Bhd; Khor Liang Khek & Anor (Third Parties) [2011] 7 CLJ 498 HC ***(refd)***

Soh Chun Seng v. CTOS-EMR Sdn Bhd [2012] 2 CLJ 886 CA ***(refd)***

For the plaintiff - AM Pillai (Chong Ian Shin with him); M/s Arulampalam & Co

For the defendant - Lua Kok Hiyong (Ummi Salhah Mohamad with him); M/s Lua & Mansor

Reported by Suhainah Wahiduddin

JUDGMENT

Gunalan Muniandy JC:

[1] The plaintiff ('P')'s claim against the defendant ('D') is briefly for negligence in the conduct of P's loan facility; for misrepresentation as to the credit status of P to the Bank Negara Malaysia Central Credit Reference Information System ('BNM CCRIS'); and for defamation for misrepresenting the status of P's loan facility to CCRIS which D allegedly continued to do even after commencement of this suit.

Summary Of Facts

[2] The brief facts according to the statement of facts filed by P are these:

(a) The plaintiff, a Small Medium Enterprise ('SME'), obtained a loan facility from Maybank in 2004 under a Corporate Guarantee Corporation Direct Access Guarantee Scheme (DAGS). Under this scheme the defendant provided the guarantee cover needed to enable plaintiff to obtain loan from Maybank;

(b) In 2008, the plaintiff, requested Maybank for the upliftment of its fixed deposit with Maybank to be used as a working capital for the plaintiff to buy the then low priced rubber which is the major primary product used by the plaintiff in its production;

(c) Maybank referred the matter to the defendant. Thus began a series of negotiations between the plaintiff and the defendant;

(d) On 28 October 2010, the outstanding loan of Two Million Ringgit to Maybank was subrogated to the defendant;

(e) The request for the upliftment of the plaintiff's fixed deposit ('FD') was rejected by the defendant. Instead the defendant liquidated the FD which was a collateral to the loan, to reduce the loan amount to RM1,436,481.31;

(f) The loan amount of RM1,436,481.31 was restructured and a scheme of payment was agreed upon between the plaintiff and the defendant in September 2011. The plaintiff was paying without any default;

(g) Meanwhile the plaintiff was trying to obtain loans from other financial institutions. But all these applications were rejected;

(h) Upon a search made by the plaintiff on 3 December 2010 at the BNM CCRIS, it was discovered that the plaintiff had been wrongly reported as owing RM11,162,013 to the defendant;

(i) By a letter dated 10 January 2011, the defendant was informed of the misreporting;

(j) The defendant admitted the mistake but did not act promptly to rectify the erroneous fact;

(k) Meanwhile the plaintiff's attempts to get loans from other financial institutions were rejected due to the adverse BNM CCRIS report;

(l) As a result of this, the plaintiff suffered losses/damages in the form of profits, lost business opportunity and its good will amongst its suppliers and business parties;

(m) Hence the plaintiff filed a civil suit against the defendant on 29 August 2012; and

(n) The plaintiff's contentions are as follows:

(i) That the defendant was negligent in not reporting the true status of the plaintiff to the BNM CCRIS;

(ii) That the defendant had misrepresented to the BNM CCRIS that the plaintiff was in debt for RM11,282,519;

(iii) When the plaintiff applied for loans, the financial standing of the plaintiff came under scrutiny and the plaintiff was embarrassed when the bankers search showed that the plaintiff was owing RM11,282,519 although the actual amount was only RM1,436,481.31;

(iv) As a result of the defendant's continued negligence and misrepresentation the plaintiff was deprived from obtaining loan from other financial institutions;

(v) Without the loan, the plaintiff was unable to expand its business and suffered losses. Further the plaintiff also missed the opportunity of buying a property worth RM27 million for RM14 million."

Agreed Facts

[3] These facts were not in dispute:

(a) By way of a facility agreement dated 12 October 2004 between the plaintiff and Malayan Banking Berhad ("first agreement") under a corporate guarantee scheme provided by the defendant known as Direct Access Guarantee Scheme ('DAGS'), the plaintiff was given a loan facility of RM350,000 in overdraft and RM340,000 in various combined trade lines;

(b) The principal loan under the first agreement was for RM690,000;

(c) Subsequently, a second facility agreement dated 29 December 2005 was entered into between the plaintiff and Malayan Banking Berhad ('second agreement') wherein the plaintiff received an increased loan facility from RM350,000 to RM1 million while the various combined trade lines was also increased from RM340,000 to RM1,000,000;

(d) The loan facility was secured by a fixed deposit collateral in the sum of RM610,000;

(e) The additional credit facilities accounts were subrogated to the defendant under DAGS;

(f) At this time there was a series of negotiations between the plaintiff and the defendant to restructure and/or discuss a scheme of payment to settle the loan that was given to the plaintiff;

(g) The plaintiff complied with the agreement and paid the monthly instalments of RM20,000 per month to the defendant effective from September 2011 until to date;

(h) Up to 31 January 2011 the outstanding amount of loan owed by the plaintiff to the defendant was not more than RM1,530,711.57;

(i) BNM CCRIS had listed the loan facility of the plaintiff as a non-performing loan with an outstanding debt of RM11,162,013; and

(j) On 18 February 2011, the defendant had sent a letter of demand to the plaintiff through its solicitors Messrs Lua & Mansor.

A **Issues To Be Tried**

[4] The parties agreed that the following would be the issues that would be tried:

(a) Whether the defendant had given wrong information to BNM CCRIS by misreporting that the plaintiff's loan facility account was in debt of RM11,162,013?

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(b) Whether the loan facility account of the plaintiff was classified as NPL due to the debt of RM11,162,013 in BNM CCRIS on 3 December 2010?

(c) Whether the defendant has failed, refused and/or neglected to rectify its misrepresentation to the BNM CCRIS after having been informed by the plaintiff by way of letter dated 10 January 2011?

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(d) Whether the defendant was aware of its mistake but failed, refused and/or neglected to rectify the report to BNM CCRIS?

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(e) Whether the credit information given by the defendant to BNM CCRIS would be widely used by financial institutions to evaluate the financial reputation and the creditworthiness of the plaintiff?

(f) Whether the credit information given by the defendant to BNM CCRIS has defamed the plaintiff when the BNM CCRIS published the credit information to the financial institutions which received it?

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(g) Whether the plaintiff's applications for loan to various financial institutions were rejected due to wrong credit information provided by the defendant to BNM CCRIS?

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(h) After the plaintiff and the defendant had come to an agreement by way of the defendant's letter dated 4 August 2011 and the plaintiff's letter dated 12 August 2011, whether the defendant failed, neglected or refused to update and/or change the status of the plaintiff from NPL and IRR to MTH with the CCRIS?

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(i) Whether the failure, negligence and the refusal of the defendant have defamed the plaintiff?

(j) Whether the wrong information provided by the defendant to BNM CCRIS and the failure, negligence and the refusal of the defendant to rectify the status of the plaintiff with BNM CCRIS have defamed the plaintiff as pleaded in para. 19 of the plaintiff's statement of claim?

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(k) As a result of the defendant's failure to update the status of the plaintiff with BNM CCRIS, did the defendant continue to misrepresent the status of plaintiff's loan as defaulting?

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(l) If the answer is affirmative, did the plaintiff incurred loss and/or face difficulties as pleaded in para. 20 of the plaintiff's statement of claim?

(m) Whether the defendant had rectified/corrected the particulars of the plaintiff in CCRIS before this action was filed?

(n) Whether the defendant is protected by the defence of "qualified privilege" in this suit?

Decision

[5] As pointed out by P the issues to be addressed revolve around the following:

(a) Negligence;

(b) Misrepresentation;

(c) Defamation;

(d) If defamation is established, whether the defendant is entitled to the defence of qualified privilege and whether the defendant is entitled to claim immunity under the Central Bank of Malaysia Act 2009.

Negligence

[6] Primarily, P's cause of action is founded upon negligence relating to D's actions and omissions that allegedly resulted in damage and loss to P, particulars of which are enumerated in para. 20 of the statement of claim.

[7] It is settled law that to succeed in an action founded on negligence, four vital ingredients must be established. In *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585, the Court of Appeal pronounced that:

> To make out a case against a defendant in the tort of negligence, a plaintiff must establish four ingredients. First, he must show that he was owed a duty by the defendant to take reasonable care. Second, that the defendant breached that duty, third, that the resultant breach caused the harm in question and fourth that he (the plaintiff) suffered damage that is not too remote.

[8] The test applicable for the existence of a duty of care was addressed by the Court of Appeal in the above case where Gopal Sri Ram JCA (later FCJ) held:

> Taking the first ingredient, the starting point in all cases where there is absent any contractual relations between the parties is the following well-known passage in the speech of Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562, 580:
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> > The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who,

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> then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

B Our courts have traditionally applied the Atkinian test to determine whether in given circumstances a duty was owed by the particular defendant to the particular plaintiff. See, for example, the judgment of Raja Azlan Shah FJ (as he then was) in *Lim Kar Bee v. Abdul Latif bin Ismail* [1978] 1 MLJ 109.

C *Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Ors* [1999] 4 CLJ 339 correctly applied the test to occupiers of adjoining land.

The significance of the Atkinian doctrine was reiterated by Salleh Abas CJ (M) in *Lembaga Kemajuan Tanah Persekutuan v. Mariam* [1984] 1 CLJ 225; [1984] 1 CLJ (Rep) 197:

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> As to the issue of negligence, Felda did not know that the contractor in breach of the agreement with Felda had sub-contracted the work. Counsel for Felda, therefore, submitted that as the subcontract was unauthorised, the sub-contractor's employee, ie, the deceased, must in the circumstances of the case be a trespasser and as such Felda owed him no duty of care at all.

E With respect, we disagree. The submission seems to us to be an attempt to revive a notion which had long been discarded in that tortious liability depends upon contractual relationship and that since Felda and the deceased had no contractual relationship with each other, Felda therefore owed no duty of care to him at all.

F This notion was abandoned in England by the House of Lords in *Donoghue v. Stevenson* [1932] AC 562, 580 and it was, to paraphrase Professor Winfield, given a 'decent burial' by the Privy Council in *Grant v. Australian Knitting Mills Ltd* [1936] AC 85, 101-102. An attempt to revive it was repelled by Lord Denning in *Greene v. Chelsea Borough Council* [1954] 2 QB 127, 138. These cases establish that a person owes a duty of care G even to persons who have no contractual relationship with him, and that his liability to an injured person depends upon whether the injury was caused by his act or omission. **It is the nature of his act and omission that makes him liable**. (emphasis added).

The effect of the authorities applying *Donoghue v. Stevenson* is that the H question whether a duty of care is owed by a defendant to a plaintiff in a given case is to be resolved in accordance with the facts and circumstances of that case: *Canadian National Railway Co v. Norsk Pacific Steamship Co* [1992] 1 SCR 1021.

[9] In the instant case, the relationship between the two parties at the I material time is pertinent in determining whether a duty of care was owed by D to P. Based on the witnesses' testimonies and undisputed evidence, the following facts material to the issue at hand emerged.

[10] D (Credit Guarantee Corporation (M) Bhd) was established expressly for the purpose of assisting Small and Medium Enterprises ('SME') to obtain loans from banks. Most of these SMEs are hard pressed to provide collateral and usually have difficulty in obtaining loan financing from banks. Therefore, the defendant's role is to provide the necessary guarantee coverage to the banks and act as a guarantor for the SMEs in order to enable them to obtain loans from the banks. It is undisputed that P is an SME and the guarantee provided by D to P is under the Direct Access Guarantee Scheme ('DAGS') which is 100% guarantee by D. In 2004, P made an application to D under the DAGS and the defendant went through the approval procedure as illustrated by SD2 during cross-examination. After D reviewed and approved P's application for DAGS, D forwarded P's application to the panel bank, ie, Maybank in our present facts, in order for Maybank to disburse the loan to P. SD2 was then the Assistant Vice President of the Subrogation Recovery Department in D.

[11] On 12 October 2004, P was given a loan facility of RM350,000 in overdraft and RM340,000 in the form of trade facilities by Maybank. Subsequently, on 29 October 2005, the plaintiff's facility was increased to RM1 million in overdraft and RM1 million in trade facilities totalling RM2 million.

[12] SD2 also revealed under cross-examination that D had given a letter of guarantee to Maybank under the DAGS whereby D had undertaken to pay Maybank the loan in the event that P defaulted in the DAGS loan. SD2 further conceded that among D's duties was to assist P which was then as SME to prevent its loan from becoming a non-performing loan ('NPL'). Under this scheme D charged a guarantee fee of 1.5% per annum based on the principal loan amount which has to be paid by P annually. P's loan amount was RM2 million. Therefore, P had been paying RM30,000 annually to D since the DAGS approval in 2004. This fact was undisputed in evidence and admitted by SD2 as shown in p. 9, cl. 3.4(d) of the facility agreement and also p. 81 cl. 3.4.4 of the second FA.

[13] From the evidence as to the relationship between P and D, particularly the purpose for which D was established and the status of P as an SME requiring loans from banks, it was plain and obvious that D owed a duty of care to P as it was clearly foreseeable that any erroneous reporting of P's credit status to a credit rating agency would result in injury or harm to P. I agree that it is fair and reasonable to impose on D a duty of care to manage P's loan ('DAGS') with reasonable care and fulfil its obligation as a guarantor of the loan under the guarantee given to Maybank.

[14] Going on to the second element of whether D had breached its duty of care, in the *Arab-Malaysian Finance Berhad* case (*supra)* Gopal Sri Ram JCA (as he then was) defined what constitutes a breach of duty of care as follows:

A We have already said that a plaintiff must also prove breach of the relevant duty. As to what constitutes a breach, we would refer to the well-known test formulated by Baron Alderson in *Blyth v. Birmingham Waterworks Co* [1856] 11 Exch 781, 784. He said that negligence is:

> The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

In *Fardon v. Harcourt-Rivington* [1932] 146 LT 391, 392 Lord Dunedin put it this way:

> If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions ... In other words, people must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities.

Lastly, in *Bourhill v. Young* [1942] 2 All ER 396, 403 Lord Macmillan formulated the relevant test in this way:

> The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.
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> It really does not matter which of these tests one applies. What is important to bear in mind is that whether there was occasioned a breach of duty in given circumstances is a pure question of fact.

[15] By reference to cl. 1.1 of the facility agreement ('FA') dated 12 October 2004 for P's DAGS loan in the sum of RM690,000 and cl. 1.1 of the FA dated 29 December 2005 for the increased facility for RM2 million CGC ('D') was defined as a security party. In this capacity, under cl. 8.1(c) of both agreements D was required to provide a 100% guarantee under DAGS. Non-payment of any amount due by the borrower or security party constitutes an event of default under both agreements.

[16] As CGC was a security party under the first and second FAs in respect of P's loan, pursuant to the letter of guarantee ('L/G') given by D to Maybank, D had provided a 100% guarantee as security for P's loan under the DAGS. Maybank issued a notice of subrogation dated 28 October 2010 wherein they confirmed that the L/Gs issued by D to them under P's DAGS loan were dated 20 October 2004, 19 January 2006 and 24 February 2009 respectively.

[17] A noteworthy fact is that the conduct of P's account with Maybank since the granting of the DAGS loan on 2004 until 2008 was proper and Maybank confirmed that P had been a creditworthy borrower. However, on 15 June 2009, P's account with Maybank ('MB') went into arrears of three months.

[18] Evidence that P adduced clearly showed that prior to P's loan becoming NPL on 15 June 2009, P had approached and written to D as early as 8 October 2008 (p. 223 Part B bundle B) to prevent P loan from becoming NPL. D had in principle agreed to restructure P loan by way of letters to P dated 20 May 2009.

[19] However, despite several reminders from MB to D demanding payment of P's loan, D failed to act to prevent P's DAGS loan clearly a failure on D's part to fulfil its contractual obligation as guarantor under the said guarantee.

[20] It was only four months later on 26 October 2009 that D issued a letter to P informing P that its loan had been classified as NPL and highlighting that since the loan "has been classified as non-performing loan, the company's and directors' name has been included in the NPL list by CGC and other financial institutions. Hence, this will inevitably jeopardise on your future loan applications with any financial institutions as well as also your current borrowing (if any) with other financial institutions."

[21] This was followed by a letter of demand ('LoD') by MB dated 5 February 2010 to P which was copied to D demanding the sum of RM1,436,481.31. However D still failed to respond in its capacity as guarantor but instead allowed P's loan to remain on NPL from 15 June 2009 until 5 February 2010 accumulating arrears of eight months.

[22] Finally, on 28 October 2010, P received the notice of subrogation and notice of assignment from Maybank dated 28 October 2010 confirming that the defendant had finally satisfied the guarantee as stated in the letters of guarantee provided by D to Maybank under P DAGS loan and hence P's loan has been assigned to D.

[23] This subrogation only occurred after 19 months from the date D first received the Maybank's reminder dated 23 March 2009 demanding payment to P's loan. By SD2's own admission, the subrogation procedure should only takes three – six months period. It was contended on behalf of P that this was blatant negligence on D's part in delaying and taking 19 months to execute the said subrogation from MB to D. From D's own documents and correspondence, there was no doubt that D had full knowledge that P's NPL status would jeopardise its future financial interests as adverted to. The 19 month arrears is reflected in BNM's CCRIS report dated 3 December 2010.

[24] As rightly submitted by P there was from the evidence adduced through the cross-examination of SD2 a blatant failure to honour the relevant terms of the guarantee under a DAGS as D could have paid the outstanding sum way back in 23 March 2009 and 27 April 2009 when D received MB's reminders to prevent P's loan from becoming default and non-performing.

[25] To sum up on this issue, from that facts and circumstances D had by its acts and omissions manifestly breached its duty of care to P by allowing P's loan to become NPL on 15 June 2009 despite having been approached by P to save the status of the loan. D had also failed to meet its obligations as a guarantor under the above guarantee resulting in the loan becoming NPL. D had further failed to monitor the P's DAGS loan with reasonable care and failed to fulfil its obligation as the guarantor under the letters of guarantee given to Maybank pursuant to the P's DAGS loan by allowing the P's loan to remain a NPL for 19 months in arrears until 28 October 2010. Had D honoured the terms of the aforesaid L/G and discharged its obligations thereunder within three months of P's default of the loan with MB or restructured the loan, P's loan account would not have been rendered a NPL.

[26] The second aspect of P's alleged negligence was its breach of its duty of care by misreporting to CCRIS that P's loan with MB was in arrears of RM11 million. This fact of misreporting surfaced upon P being informed by a financial institution that they did not qualify for a loan due to a NPL account of RM11 million conducted a Bank Negara CCRIS search on the 3 December 2010 and was taken back to discover that the P's loan was under NPL with Maybank and the defendant was at RM11,162,013. From the evidence of material witnesses, it is only D who could have supplied the info as to P's indebtedness to CCRIS. D further failed to respond to P's letter dated 10 January 2011 notifying them of the false and erroneous information in the CCRIS system.

[27] It was only on 4 March 2011 that D finally wrote to P admitting that the amount of loan was inaccurately reported, the correct amount was RM1,530,711.57 and expressed its sincere apologies. The letter stated that the error had been rectified on 2 March 2011.

[28] The evidence from the subpoena witness from Bank Negara established the fact that CCRIS is a centralised system that collects information on loans from banks and distributes back the report to the banks in a form of credit report. The defendant is a voluntary subscriber to CCRIS. As for the time frame for D to make reporting to CCRIS on the P's loan is once a month by the 10th every month for previous month submission. The information in P's CCRIS report with regards to P's DAGS loan after subrogation on 28 October 2010 was entered into by D who had the sole obligation to ensure that all the credit information entered into the CCRIS is accurate and correct. This obligation had to be strictly discharged as the

information was accessible to participating financial institutions. Hence any false information or misreporting could cause serious prejudice and harm to the borrower in respect of its credit status.

[29] Based on the overall evidence adduced and the relevant circumstances, I found that P had made out a case of D having breached its duty of care owed to P. I upheld P's contention that it was clear and indisputable that the breach by D was as follows:

(a) Firstly, the defendant had misreported to CCRIS that the plaintiff's loan was in arrears of RM11 million;

(b) Secondly, the plaintiff on 10 January 2011 had duly notified the defendant of the erroneous information in the plaintiff's CCRIS report, however, the defendant instead of heeding the plaintiff's request to rectify the CCRIS information, the defendant had acted unreasonably in pressuring the plaintiff by instructing their solicitors to issue a letter of demand to the plaintiff on 18 February 2011;

(c) Thirdly, the defendant had failed to rectify the erroneous information in the plaintiff's CCRIS report within two working days upon realising the error as stipulated under the Bank Negara guideline;

(d) Fourthly, the defendant took two months to rectify the erroneous information that the defendant entered about the plaintiff's loan in CCRIS despite the fact that as early as 10 January 2011, the defendant had been notified by the plaintiff of the erroneous information in CCRIS. Further, the defendant had failed to reply to the plaintiff until 4 March 2011 where the defendant wrote to the plaintiff confirming that the error in the plaintiff's CCRIS report had been rectified.

[30] Lastly, it was undeniable and uncontroverted that D had continually been negligent in various respects in misreporting P's loan to the CCRIS even after finalisation on the restructuring of the plaintiff's loan and also after the filing of this suit. It is pertinent to note that the misreporting of P's loan by D spanned over the period of the years 2010 to 2013.

[31] Next, with regard to the vital element of causation, the question arising being one of fact, ie, whether P's loss and damage were caused by D's negligence, turns on the particular facts and circumstances of the case. There was evidence from SP1 to the effect that because of the negligence on the part of the defendant in the conduct of the plaintiff's loan, the plaintiff's various loan applications have been rejected by the financial institutions concerned. SP1 had also given the list of the various loan applications which the plaintiff had made to certain financial institutions. There was further evidence from a subpoenaed witness (SP2) who was a former loan officer from the United Overseas Bank which the plaintiff had approached for a loan at the end of year 2010. However, the plaintiff's loan application to the United Overseas

A Bank was turned down by SP2 who testified that she did not proceed with the said loan application because of the multiple months of arrears that appeared in the plaintiff's CCRIS report.

[32] Considering the evidence adduced on this issue through the material witnesses of both parties, the breach of duty of care as alluded to above by
B D had, at least, materially contributed to the losses and hardship suffered by P in regard to its credit standing and inability to obtain loans as a consequence of the misreporting. The element of causation has therefore, been satisfied.

C **[33]** Finally, it is trite law that damages are recoverable by the victim of a tort only if it could be established that it was reasonably foreseeable by the defendant. The principle applicable was lucidly explained in the *Arab (M) Finance* case *(supra)* by Gopal Sri Ram JCA (as he then was) as follows:

> It is settled that a plaintiff can recover only that loss which a defendant
> D could reasonably foresee would ensue to the victim of the tort. So, the test we must apply is one of reasonable foreseeability. Whatever may be the debate in England as to the life hereafter of the direct consequences test in *Re Polemis* [1921] 3 KB 560 after the decision of the Privy Council in *The Wagon Mound* [1961] AC 388, we are by bound by the latter decision. Our courts have in several cases applied the *Wagon Mound* test
> E of reasonable foreseeability of harm and we are obliged by the doctrine of precedent to follow them. See, for example, *Government of Malaysia & Ors v. Jumat bin Mohamed & Anor* [1977] 2 MLJ 103.
>
> In *Jaswant Singh v. Central Electricity Board & Anor* [1967] 1 MLJ 272, Gill J (as he then was) explained the replacement of the *Re Polemis* test by the
> F *The Wagon Mound* test as follows:
>
> As regards damage in consequence of a breach of a duty to take care, the fundamental rule is that the injury suffered by the plaintiff must not be too remote a consequence of the defendants' conduct, or, as it is often said, the damage must not be too remote
>
> G …
>
> Now, what precisely must be foreseeable by a negligent defendant? On the authorities, the answer seems to be that it is the kind of harm that must be foreseen. Once the kind of harm is foreseeable, then the tortfeasor is liable to the full extent of it.
>
> H …
>
> So, it comes to this, whether a particular kind of harm was reasonably foreseeable is a question of fact that depends upon the peculiar facts of each case.

I **[34]** In the instant case I found that the damages suffered by P was definitely foreseeable by D as there was an admission by D themselves in their own letter dated 26 October 2009 which was issued to P informing P that P's loan had been classified as NPL (p. 156 part A Bundle B). In the

same letter, D had also highlighted to P that since the latter's loan "has been classified as non-performing loan, the company's and directors' names has been included in the NPL list by CGC and other financial institutions.

[35] Therefore, there can be no doubt or dispute from the uncontroverted facts and circumstances adverted to that the loss and damage suffered by P was reasonably foreseeable by D in carrying out its role and function as a credit guarantor. This fact is beyond dispute as D themselves admitted in their letter that the effect of P's loan being wrongly classified as NPL would be to jeopardise P's future loan applications. This erroneous classification was the direct result of D's negligent reporting or submitting wrong information to CCRIS regarding P's credit status.

Defamation

[36] First, on the law applicable in *Ng Hong Chai & Anor v. Public Bank Bhd; Khor Liang Khek & Anor (Third Parties)* [2011] 7 CLJ 498 *(supra)*, the learned judge correctly pointed out that:

> ... In *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461, the Court of Appeal (at p. 466, para F) held:
>
> > It cannot, I think, be doubted that the first task of a court, in an action for defamation, is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published.
>
> And also at p. 467 para E:
>
> > ... Having decided whether the words complained of are capable of bearing a defamatory meaning, the next step in the inquiry is for a court to ascertain whether the words complained of are in fact defamatory.

[37] In a case where the facts are pertinent to the instant case, *Soh Chun Seng v. CTOS-EMR Sdn Bhd* [2012] 2 CLJ 886, the Court of Appeal held:

> (1) The defendant, as a provider of credit information, was providing information which would lead to the assessment of the financial reputation and creditworthiness of the particular subject matter of the information. As the information on the plaintiff in exh. P2 was in relation to the issuance of a creditor's petition, it undoubtedly amounted to credit information that would lead any reasonable reader to be suspicious of the creditworthiness of the plaintiff. (paras 12 & 13)
>
> (1a) The credit search report (D14) published on 20 September 1997 contained a remark which indicated that the creditor's petition against the plaintiff had been struck out as the debt had been fully settled on 23 September 1993. In other words, when the first credit search report was published on 29 April 1997, the plaintiff was no longer facing the said creditor's petition. Therefore, exh. D14 was an admission by the defendant that the original credit information in exh. P2 was factually

A neither true nor accurate. Corollary to this, it was clear that the information in P2 was capable of bearing a defamatory meaning. (paras 15 & 16)

(1b) On the issue of the preceding head-note that tantamounts to a proviso that ought to negate any liability on the reliability of the credit B information in exh. P2, such preceding head-note did not, on the facts of the case, absolve the defendant from responsibility for its mistakes. Thus, in law and fact, the credit information published in exh. P2 was defamatory of the plaintiff.

[38] With regard to the effect of the offending words on the ordinary man, C in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & 2 Other Appeals* [1995] 2 CLJ 912 YA Gopal Sri Ram JCA (as he then was) held *inter alia* that:

> The decision of the House of Lords in *Lewis v. Daily Telegraph Ltd. (sub nom, Rubber Improvement Ltd. v. Daily Telegraph Ltd.)* [1964] AC 234 contains all the knowledge upon this subject. I need only to refer to certain D passages in the speeches of Lord Reid and Lord Devlin.
>
> I quote first from the speech of Lord Reid, at page 258:
>
> > There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in E an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs. I leave aside questions of innuendo where the reader has some special knowledge which might lead him to attribute a meaning to the words not apparent to those who do not have that knowledge.

F **[39]** In my finding, D's negligent acts or omissions as evident in this case from the facts elaborated above, basically from the provision of wrongful credit information to CCRIS, had satisfied the elements of defamation by libel.

G **[40]** Firstly, the words complained of in the form of the aforesaid wrongful credit information on this standing of P, based on leading authorities cited that are binding on this court, are capable of bearing a defamatory meaning against P. The false and untrue information reported by D to CCRIS could be regarded as having defamatory imputations against P. It was also premature reporting on P's loan to the agency prior to subrogation of P's loan H from MB to D.

[41] Secondly, the reporting of the above false information by D to CCRIS constituted publication to a third party and therefore, satisfied the element of publication as the information was accessible to participating banks and I institutions. The fact that publication to financial institutions upon search being made was the responsibility of CCRIS did not derogate from the fact of publication by D to third parties.

[42] Thirdly, from the clearly established factual matrix, the defamatory information published obviously referred to P and no other entity or person. This is a fact beyond any dispute.

[43] As for the defence of qualified privilege raised by D, the facts and circumstances of this case clearly did not support and fulfil the elements for this kind of defence to succeed. *Inter alia*, the D failed to discharge the onus of showing that the publication was fairly made by a person in the discharge of some public or private duty. Hence, the continuous publication of the said false and untrue information would in law be regarded as malicious as no attempt was made to rectify the record despite being made aware of the grave error.

Negligent Misrepresentation ('NM')

[44] I agree with D's contention that the tort of NM has not been specifically pleaded together with the essential material particulars of D's liability for this tort. As parties are in principle strictly bound by their pleadings, evidence or submission of D having committed this tortious act cannot be considered in the determination of this claim. Hence, I hold that NM has not been strictly pleaded and proved on the applicable standard of proof.

Conclusion

[45] Premised on the foregoing grounds, the facts and evidence alluded to, I concluded that the plaintiff had on a balance of probabilities established its pleaded claim for the torts of negligence and defamation by libel against the defendant but not for negligent misrepresentation. I, accordingly, entered judgment on the relevant reliefs prayed for with interest and costs of RM100,000 to the plaintiff.